84-379

No. ___

SEP 6 1984

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLARK OIL & REFINING CORPORATION,

Petitioner,

—against—

ALPINE SHIPPING COMPANY and MARC RICH & CO., A.G., on behalf of Lloyd's Underwriters' Claims and Recoveries Office for Subrogated Cargo Underwriters,

Respondents.

PETITION OF CLARK OIL AND REFINING CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

May a district court confirm an arbitration award where the effect is to allow arbitrators to decide their own jurisdiction despite the absence of any agreement allowing them to do so, or should such award be vacated because the arbitrators exceeded their powers within the meaning of 9 U.S.C. § 4 and § 10(d)?

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IN THE

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OCTOBER TERM, 1984

CLARK OIL & REFINING CORPORATION,

Petitioner,

—against—

ALPINE SHIPPING COMPANY and MARC RICH & CO., A.G., on behalf of Lloyd's Underwriters' Claims and Recoveries Office for Subrogated Cargo Underwriters,

Respondents.

PETITION OF CLARK OIL AND REFINING CORPORATION[1] FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DECISIONS BELOW

The decision of the Court of Appeals filed April 18, 1984, affirming the district court's order and judgment is reprinted in Appendix "A".[2] The decision of the Court of Appeals filed

1 The Parent company of petitioner is Apex Holding Co., whose parent is Apex Oil Co., a partnership between two privately owned companies, Goldstein Oil Co. and Novelly Oil Co.

2 References to material included in the Appendices will be referred to as "App" followed by the appropriate page reference.

June 8, 1984, denying petitioner's motion for rehearing and suggestion for rehearing *en banc* appears here in Appendix "B". The memorandum opinion of the United States District Court, Southern District of New York of December 9, 1983, granting respondents' motion to confirm the award and denying petitioner's cross-motion to vacate arbitration award is reprinted in Appendix "C".

JURISDICTION

Petitioner seeks review of a decision of the Court of Appeals for the Second Circuit filed April 18, 1984. By order dated June 8, 1984, the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction is invoked under 28 USC §1254(1).

STATUTES INVOLVED

9 U.S.C. §4. Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties and upon being satisfied that the making of the agreement for arbitration or the failure to comply there-

with is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitrtation is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceedings shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. As amended Sept. 3, 1954, c.1263 §19.68 Stat. 1233.

9 U.S.C. §10. The United States Arbitration Act:

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. July 30, 1947, c.392. §1,61 Stat. 669.

STATEMENT OF THE CASE

This petition seeks review of an affirmance by the United States Court of Appeals for the Second Circuit of a judgment and order of the United States District Court for the Southern District of New York (Gerard Goettel, J.) granting respondents Alpine Shipping Company ("Alpine") and Marc Rich & Co., A.G.'s ("Marc Rich") motion to confirm an arbitration award and denying petitioner Clark Oil & Refining Corporation's ("Clark") cross-motion to vacate.

The basis of the appeal was that as a matter of law, the commercial arbitrators in this maritime charterparty controversy had exceeded their powers within the meaning of §10(d) of the United States Arbitration Act by determining an issue not submitted to them by terms of the submission agreement entered into by the parites

The disputes which were the subject of the underlying arbitration arose out of an STB VOY. form sub-charterparty of the vessel M/T VOLERE dated October 11, 1979, between

Clark and Alpine for a voyage from "one safe port Dubai" to "one safe port Curacao or Bonaire." The VOLERE was at the time under a long term charter to Clark from her owner, Eraclide S.p.A., Polermo, Italy. The vessel was a very large crude carrier with a carrying capacity of approximately 250,000 L/T, and on the voyage in question was carrying three parcels of cargoes, one for the account of Clark, one for the account of Philips Petroleum, and a third under the charterparty between Clark and Alpine. The Alpine parcel was covered by a bill of lading issued to the shipper, Gulf Resources.

The bill of lading issued for the Alpine parcel made no reference to the charterparty between Alpine and Clark nor to any agreement to arbitrate between Clark and Marc Rich or anyone else. After the discharge at Bonaire of the Alpine parcel, dispute arose as to shortage of cargo upon delivery. The merits to the underlying arbitration are not at issue here.

By letter dated July 22, 1980, Marc Rich as bill of lading holder and Alpine as voyage charterer demanded that Clark arbitrate the dispute. The letter stated that, "the parties make this demand pursuant to the charterparty and pursuant to its terms, as incorporated into the bill of lading . . . ." On August 7, 1981, Alpine and Marc Rich were advised by Clark as to Clark's nomination of an arbitrator. At the first arbitration hearing, counsel for Clark made clear that Clark had never agreed to arbitrate with Marc Rich or its subrogated underwriter, stating:

> First you will note from the caption that name of claimants are Alpine Shipping Company, the charterer of the vessel, and Marc Rich, the bill of lading holder.
>
> We have never agreed to arbitrate with Marc Rich & Co., and I will note from the bill of lading, which is exhibit 2 that it does not incorporate the charterparty.
>
> I must state on the record that at least for the time being we object to arbitrate with either Marc Rich & Co. and/or their subrogated underwriter.

> Assuming that we do not consent to arbitrate with them, we will have to determine whether it is proper for us to express our objections to the arbitrators or whether we will have to go to court to seek them from arbitrating with us.

At that time, attorneys for Alpine and Marc Rich contended in response that Marc Rich as bill of lading holder and, hence, its subrogated underwriter at Lloyd's, had a right to demand arbitration directly with Clark, stating to the panel:

> We will be able to establish that the terms of the charterparty were incorporated in the bill of lading.

At the request of the arbitrators, attorneys for both sides agreed to draft a submission agreement stating the specific issues and claims which the panel would be authorized to decide. The submission agreement was submitted to the panel at the second hearing on March 10, 1982. In it, the parties agreed in carefully limited language to allow the arbitrators to decide whether Marc Rich had standing as the bill of lading holder to arbitrate directly with Clark. This narrow issue was framed as follows:

> Whether Marc Rich, *as the alleged bill of lading holder* (or any party, such as Marc Rich's subrogee or transferee, claiming through the bill of lading) is entitled to arbitrate its claims in these proceedings *directly* with Clark. [Emphasis added]

In the context of the submission of this narrow issue of arbitrators' jurisdiction, the parties further agreed that they would not appeal or seek to modify the panel's award on the ground of 9 U.S.C. § 10(d) that the arbitrators had exceeded their powers.

For the arbitrators to have answered affirmatively the question of the ability of Marc Rich as bill of lading holder to proceed *directly* against Clark, they would have been required to find that the charterparty between Clark and Alpine con-

taining the arbitration clause was incorporated into the bill of lading. The issue of whether Marc Rich had standing to proceed against Clark through its corporate affiliation with Alpine was never submitted to the panel. On the contrary, as counsel for Clark made clear in his affidavit in support of Clark's motion for an order vacating, correcting or modifying the award:

> At the time the Submission Agreement was drafted, I was well aware of certain New York maritime arbitration awards which held (we contend incorrectly) that the companies affiliated with the party to an agreement to arbitrate could assert and arbitrate their own claims through the party. In other words, under the facts of this case, the issue would be whether Marc Rich (who allegedly was somehow connected with Alpine) would be permitted to assert its claim against Clark through Alpine with whom Clark had agreed to arbitrate. We would never have consented to submit such an issue to this arbitration panel, and it is clear that a panel of arbitrators is not competent to decide that question. Arbitration is purely a creature of contract and only a court can decide whether there is a valid agreement to arbitrate between two entities unless the parties consent to present the issue to the arbitrators.

In direct contravention of the submission agreement, Alpine and Marc Rich argued to the panel the much broader issues of affiliation and waiver of the right to object to arbitration; consequently, in their final award dated September 23, 1983, the arbitrators went beyond the narrow issue presented to them and held that Marc Rich and its subrogated underwriters were entitled to participate in this arbitration against Clark because of its corporate affiliation with Alpine. The panel stated in the award:

> It is the panel's unanimous decision that Rich is a proper party to this arbitration proceeding and may, along

> with Alpine, present its claim to this Panel. It is acknowledged in the trade and there is sufficient evidence in this proceeding to permit the panel to accept the corporate affiliation of Rich and Alpine and the fact that Alpine operates as the chartering arm of the Rich organization.

The arbitrators carefully avoided any finding of incorporation of the arbitration clause between Clark and Alpine in the bill of lading. Instead, they found Marc Rich entitled to arbitrate in the absence of any contractual basis by relying upon corporate affiliations and general trade knowledge of the organization and structure of the Marc Rich operation.

The district court, in granting Alpine and Marc Rich's motion to confirm the arbitration award, acknowledged that the award did not meet the issue of Marc Rich's right "as bill of lading holder" to arbitrate "directly" with Clark. [App 8a].[3] The court instead speculated as to other possible bases beyond corporate affiliation and bill of lading incorporation for the arbitrator's conclusion that Marc Rich was a proper party to the arbitration, such as "that Clark had implicitly agreed to arbitrate with Marc Rich by participating in the arbitration and responding to the bill of lading holder's demand, or that it was estopped from denying the arbitration demand after the one-year time bar for suits had expired, or that the failure to contest the arbitration demand in a timely fashion had waived any later dispute." [App 9a]. None of these issues are within the competence of arbitrators under the United States Arbitration Act. None were submitted to these arbitrators by special contract [the submission agreement] nor were any even decided or discussed by the arbitrators in their award.[4]

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3 In confirming the arbitration award, the district court stated:

> Moreover, it is clear from the foregoing recitation of facts that Clark never indicated during the arbitration that the submission restricted the panel to a simple consideration of Marc Rich's rights as a bill of lading holder. [App 10a]

This was error. In its post-hearing brief to the arbitrators which was before the court below, Clark repeatedly stressed the restriction.

The district court further held that Clark was precluded by the submission agreement from claiming that the arbitrators had exceeded their power in deciding that Marc Rich had a right to arbitrate through its corporate affiliation because 9 U.S.C. § 10(d) was not incorporated into the agreement. The court stated, "Clark has therefore, by its own agreement, precluded itself from making the argument that the arbitrators exceeded their power." [App 10a] The United States Court of Appeals for the Second Circuit affirmed the district court's decision in a cursory two page unpublishable opinion. [App 1a] After stressing the intent behind arbitration to permit quick and inexpensive resolution of disputes and noting the policy against frustrating this purpose by overly technical judicial review of arbitration, the Second Circuit held:

> Applying these principles to the instant case, we conclude that the district judge did not err in holding that pursuant to the terms of the submission agreement, Clark was precluded from challenging the arbitration award on the

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4 Moreover, it is fundamental that corporate affiliates and related parties may not avail themselves of, or be bound by, arbitration agreements of separate entities. *Caribbean Steamship Co.*v. *Sonmez Denizcilik Ve Ticaret A.S.*, 598 F. 2d 1264, 1265-1266, (2d Cir. 1979); *Janmort Leas., Inc.* v. *Econ-Car International*, 475 F. Supp. 1282 (E.D.N.Y. 1979).

It is equally fundamental that where, as in the case at bar, a charterparty is not sufficiently identified in a bill of lading, it is not incorporated by reference and a bill of lading holder may not compel arbitration pursuant to its terms. The bill of lading though which Marc Rich sought to compel Clark to arbitrate, as aforesaid, contained no mention of the charterparty between Clark and Alpine. Rather, that document merely stated that it was subject to the terms of a charterparty in the printed form, but the spaces provided on the form to identify a specific charterparty were left blank. This is clearly insufficient. *U.S. Barite Corp.* v. *M.V. HARIS,* 1982 A.M.C. 925 (S.D.N.Y. 1982); *Amoco Oil Co.* v. *M.T. MARY ELLEN,* 529 F. Supp. 227 (S.D.N.Y. 1981); *United States* v. *Cia. Naviera Continental, S.A.*, 202 F. Supp. 698 (S.D.N.Y. 1962); *Joo Seng Hong Kong Co., Ltd.* v. *SS UNIBULKFIR,* 493 F. Supp. 35 (S.D.N.Y. 1980); *Cia. Platamon de Navegacion* v. *Empresa Colombiana*, 478 F. Supp. 66 (S.D.N.Y. 1979).

> ground that the arbitrators exceeded their power in ruling that Marc Rich was a proper party to the arbitration proceeding. [App 3a]

Both courts misconceived the submission agreement. The provision waiving Clark's right to seek to vacate or modify an award upon the ground that the arbitrators exceeded their powers under § 10(d) of the United States Arbitration Act was inserted only because the parties realized that they were conferring upon the arbitrators special power to decide the issue of Marc Rich's entitlement to arbitrate "as bill of lading holder" "directly" with Clark. Co-extensive with that special limited empowerment, the parties wished to make it clear that they would live with the arbitrator's decision as to jurisdiction on that limited issue. The entire point of this appeal was and is that the arbitrators were not empowered to determine whether Marc Rich as an affiliate of the charterer or otherwise had the right to arbitrate indirectly or derivatively or for any other reason with Clark. The arbitrators were only empowered to determine Marc Rich's right to arbitrate directly as bill of lading holder. This they declined to do.

To equate that limited submission with the broader question "whether Marc Rich was a proper party to the arbitration" has the effect of requiring Clark to arbitrate with Marc Rich in the absence of an agreement to do so without the opportunity provided for in the United States Arbitration Act, 9 U.S.C. § 4 to require judicial determination of the existence or non-existence of such an agreement.

REASONS FOR GRANTING THE WRIT

A. THE EFFECT OF THE DECISIONS BELOW IS TO ALLOW ARBITRATORS TO DECIDE THEIR OWN JURISDICTION DESPITE THE ABSENCE OF A SPECIFIC AGREEMENT ALLOWING THEM TO DO SO; THE ISSUE OF THE POWER OF ARBITRATORS TO DECIDE JURISDICTION WITHIN THE PURVIEW OF 9 U.S.C. § 4 and § 10(d) IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

This Court has held that arbitration is a matter of contract and questions of the arbitrators' authority are determined by reference to the agreement. The parties to an arbitration agreement cannot be required to submit to arbitration any dispute which they had not agreed would be subject to that manner of resolution. *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). An arbitration award not within the scope of the governing arbitration clause is one made in excess of authority and the courts are precluded from enforcing such an award. *United Steel Workers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Moreover, where arbitrators have ventured into deciding their own jurisdiction, their award is not entitled to the usual difference shown to arbitration awards on the merits. *Torrington Company* v. *Metal Prods. Workers Union Local 1643*, 362 F.2d 677, 680-1 (2nd Cir. 1966). *Federal Commerce & Navigation Co.* v. *Kanematsu Gosho, Ltd.*, 457 F.2nd 387, 389 (2d Cir. 1972), cited by the Second Circuit here for the proposition that the purpose of arbitration should not be frustrated by "overly technical judicial review of arbitration award" [App 3a] did not involve the question of the right of a third-party to arbitrate with the vessel owner. Rather it concerned a submission to arbitrators of an issue as to whether a specific master charter was void or valid. The arbitrators went

on to hold that two of the individual vessel and cargo charters underlying the master charter were to be considered cancelled and the remainder thereof valid and had to be performed. The case did not involve a question of arbitrators determining their jurisdiction, but one where they determined issues subsumed within the submission agreement. Of note is the dissent of Judge Hays wherein he considered the submission agreement to have been unambigious and not susceptible of the interpretation that the validity of the individual charters was submitted for arbitration.

The case at bar presents issues more similar to those dealt with by the Court of Appeals for the District of Colombia Circuit in *Davis* v. *Chevy Chase Financial Ltd.*, 667 F. 2d 160 (D.C. Cir. 1981), a decision in conflict with the decision here of the Second Circuit. There, an agreement between a corporate officer and his former employer provided (1) for the employee to tender his shares in the company upon termination of his employment and (2) for arbitration of the question of the value of the shares so tendered. The arbitrator, rejecting the employee's contention that he was not under a contractual obligation to resell the shares, ordered their conveyance. The employee participated in the arbitration throughout, but reserved at all times his contention that the arbitrator did not have jurisdiction to direct the conveyance. The District of Colombia Court of Appeals, in reversing the district court, upheld the employee's challenge to the award, stating:

> "We agree with appellant that the arbitrator exceeded his authority in ruling that Davis was contractually obliged to sell his shares to CCFL. Although the arbitration clause at issue here did not explicitly bar consideration of questions other than the value of the shares, we find the relevant wording necessarily implied that the arbitrator's authority was so limited." 667 F. 2d at 166.

Noting the employer's argument that great deference is normally accorded an arbitrators' award, the Circuit Court further stated:

> "Where, however, a party to an arbitration proceeding challenges the arbitrator's *authority* to decide a particular issue, the function of a reviewing court is distinctly different. The threshold question of arbitrability is one of law and the reviewing court is obligated to make its own determination of the issue. *Mobil Oil Corp.* v. *Local 8-766*, 600 F.2d 322, 324-25 (lst Cir. 1979). The court's decision may, of course, be informed by the arbitrator's resolution of the arbitrability question, id. at 325, and we agree with appellees that, where the scope of arbitration is "fairly debatable" or "reasonably in doubt," the arbitrator's assumption of jurisdiction should be upheld . . . Neither arbitrators nor courts, however, have the prerogative to redraft an arbitration clause to require parties to arbitrate matters that they did not initially agree to arbitrate. *Farkar Co.* v. *R.A. Hanson, DISC. Ltd.*, 583 F.2d 68, 72 (2d Cir. 1978)".
>
> 667 F. 2d at 166-67

There was no valid basis upon which the arbitrators in this case could determine that they had jurisdiction to arbitrate the claims of Marc Rich because Marc Rich was an affiliate of the charterer and therefore entitled indirectly or derivatively under some theory of corporate identification to arbitrate. Their doing so, moreover, transcended the submission agreement limiting them to the issue of Marc Rich's right to arbitrate "directly" "as alleged bill of lading holder."

Petitioner agrees with the Second Circuit that arbitrations should be encouraged as a quick and inexpensive method of dispute resolution. That policy is one with which Clark tried to act consistently by permitting the arbitrators to decide Marc Rich's right to arbitrate directly as bill of lading holder. It has been penalized for this by the arbitrators' action in determining their own jurisdiction to exist on a basis not submitted to them. In so doing, the arbitrators exceeded their powers and their award should be set aside. Policies favoring arbitration cannot create a valid enforceable agreement to arbitrate between separate legal entities which have not assented thereto.

CONCLUSION

THE COURTS BELOW, IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT, HAVE EXPANDED THE AUTHORITY OF ARBITRATORS TO DECIDE THEIR OWN JURISDICTION IN ABSENCE OF A SPECIFIC AGREEMENT ALLOWING THEM TO DO SO. THIS CASE RAISES THE ISSUE OF WHETHER SUCH BROAD DISCRETION TO DECIDE JURISDICTION ALLOWED ARBITRATORS IS CONSISTENT WITH THE LANGUAGE AND PURPOSE OF 9 U.S.C. § 4 AND § 10(d); THIS PETITION PRESENTS THE COURT WITH A FEDERAL QUESTION OF SUCH IMPORTANCE GIVEN THE INCREASINGLY WIDESPREAD USE OF ARBITRATION, THAT IT SHOULD BE DECIDED BY THIS COURT.

Respectfully submitted,

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WALKER & CORSA
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Of Counsel

APPENDICES

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit dated April 18, 1984

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 84-7015

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of April, one thousand nine hundred and eighty-four.

Present:

HONORABLE WALTER R. MANSFIELD,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

ALPINE SHIPPING CO. and MARC RICH & CO. A.G., on behalf of LLOYD'S UNDERWRITERS' CLAIMS AND RECOVERIES OFFICE for Subrogated Cargo Underwriters,

Petitioners-Appellees,

—v.—

CLARK OIL & REFINING CORP.,

Respondent-Appellant.

ORDER

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is AFFIRMED.

1. Clark Oil and Refining Corp. ("Clark") contends that the district court erred in not granting its motion to vacate the arbitration award on the ground that the panel of arbitrators had exceeded its power in ruling that Marc Rich & Co. A.G. ("Marc Rich") was a proper party to the arbitration. Prior to the first arbitration hearing, Clark's counsel agreed that the arbitrators could decide whether Marc Rich was entitled to arbitrate with Clark and whether the claims of Marc Rich or Lloyd's could be asserted by Alpine. Thereafter, one of the issues phrased for the arbitrators was "whether Marc Rich, as the alleged bill of lading holder (or any other party, such as Marc Rich's subrogee or transferee, claiming through the [b]ill of lading), is entitled to arbitrate its claims in these proceedings directly with Clark". The parties to the submission agreement specifically agreed that they would not challenge the arbitrators' award on the ground that the panel of arbitrators had exceeded its power in deciding whether Marc Rich was a proper party to the arbitration.

2. In their decision, the arbitrators concluded that Marc Rich was a proper party to the proceeding and could, along with Alpine, present its claim to the arbitrators. Four years after the loss, long after the time for filing civil actions, and contrary to the agreement not to raise this challenge, Clark now claims that the arbitrators exceeded their power in deciding that Marc Rich was a proper party to the arbitration.

3. Arbitration proceedings are intended "to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings." *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980). This "basic purpose[ ] of arbitration" should not be frustrated by "[o]verly technical judicial review of arbitration awards." *Federal Commerce & Navigation Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 389 (2d Cir. 1972). Thus, "it has long been the rule to resolve any doubt as to the submission agreement in favor of coverage." *Id.* at 390. Applying these principles to the instant case, we conclude that the district judge did not err in holding that pursuant to the terms of the submission agreement, Clark was precluded from challenging the arbitration award on the ground that the arbitrators exceeded their power in ruling that Marc Rich was a proper party to the arbitration proceeding.

4. We deny appellees' request for attorneys fees.

5. Clark's other contentions also are without merit. We affirm the order of the district court. We grant double costs to appellees.

/s/ WALTER R. MANSFIELD
Walter R. Mansfield,

/s/ LAWRENCE W. PIERCE
Lawrence W. Pierce,

/s/ GEORGE C. PRATT
George C. Pratt,

Circuit Judges.

LWP

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B

Order of the United States Court of Appeals for the Second Circuit dated June 8, 1984

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 84-7015

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of June one thousand nine hundred and eighty-four.

ALPINE SHIPPING COMPANY AND MARC RICH & CO. A.G., ON BEHALF OF LLOYD'S UNDERWRITERS' CLAIMS AND RECOVERIES OFFICE FOR SUBROGATED CARGO,

Plaintiffs-Appellees,

v.

CLARK OIL & REFINING CORPORATION,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Clark Oil & Refining Corporation,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith,
Clerk

APPENDIX C

Memorandum Decision of the District Court, Southern District of New York (Gerard L. Goettel, J.) dated December 9, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

83 Civ. 7165 (GLG)

In the Matter of the Arbitration

—between—

ALPINE SHIPPING COMPANY and MARC RICH & CO. AG, on behalf of Lloyd's Underwriters' Claims and Recoveries Office for Subrogated Cargo Underwriters,

Petitioners,

—and—

CLARK OIL & REFINING CORPORATION,

Respondent,

Under Charter Party dated October 11, 1979, and Bill of Lading dated October 17, 1979, for the M/S VOLERE.

MEMORANDUM DECISION

This is an action to confirm an arbitration award, which is met by the increasingly common motion to vacate or modify the arbitration award.

Alpine Shipping Company ("Alpine") chartered from Clark Oil & Refining Corporation ("Clark") (as disponent owner) a voyage to Caribbean Islands carrying varying cargoes of crude

oil. Alpine is purportedly the chartering arm of Marc Rich & Co. AG ("Marc Rich"). Marc Rich had one of the parcels aboard the tanker and the master of the vessel signed the Bill of Lading for receipt of its crude oil. There was a substantial loss of cargo upon delivery. For a period of nine months, the cargo claimants attempted to adjust the loss with Clark, without reaching any final agreement. They were then confronted with the one-year contractual limitation for the enforcement of such claims. The charter party called for arbitration in New York City, as is common in such documents. Alpine and Marc Rich both demanded arbitration and selected their arbitrator. (The demand on behalf of Marc Rich was made "under the terms of the Charter Party as incorporated into the Bill of Lading.") The losses of both these parties was paid by their insurer, Lloyd's of London ("Lloyd's"), who has been the real party in interest thereafter.

After arbitration was demanded, Clark continued to seek more time to consider the claim. An additional year's delay occurred. Finally, upon the claimants' insistence, Clark responded to the arbitration demand, without reservation, and appointed its arbitrator, who, along with the previously selected arbitrator, agreed on the impartial arbitrator. Two months later, the first arbitration hearing was held and Clark's counsel indicated that it had no objections to the panel as constituted. Later in the hearings, however, Clark raised a question, for the first time, concerning whether it should be arbitrating with Marc Rich and its subrogated underwriter, stating: "It is possible we may consent to arbitrate with them but I do not know right now whether we will."

This belated challenge to the arbitration demand was immediately attacked by Lloyd's' counsel. The panel advised Clark's counsel that, if it wished to challenge the arbitration, it would have to either go to court or ask the panel to rule on whether the parties were proper. Further time elapsed. Finally, in November 1981, Clark's counsel wrote that "in the spirit of compromise Clark would be willing to let the arbitrators decide whether Marc Rich is entitled to arbitrate with Clark or whether the claims of Marc Rich or Lloyd's can be asserted by

Alpine." A submission agreement was thereafter prepared. One of the issues phrased for the arbitrator was "[w]hether Marc Rich, as alleged bill of lading holder (or any party, such as Marc Rich's subrogee or transferee, claiming through the bill of lading) is entitled to arbitrate its claims in these proceedings directly with Clark."

In discussing this portion of the submission with the arbitrators, Clark's counsel stated that there were two issues for determination: "The first is whether Marc Rich as a Bill of Lading holder is entitled to arbitrate in this proceeding. The second is whether Clark, as time-charterer owner of the vessel, is liable to Marc Rich as Bill of Lading holder for cargo loss." The parties also specifically agreed that they would not challenge the arbitrators' award on the ground that the arbitrators had exceeded their power in making their decision.

The arbitrators, in their decision, concluded: "The Panel, based upon its examination of the evidence, unanimously concludes that Claimants have presented a thoroughly documented cargo loss claim for which Clark may be found responsible." (Award p. 12). The award also concluded the "it is the Panel's unanimous decision that Rich is a proper party to this arbitration proceeding and may, along with Alpine, present its claim to this Panel." (Award p. 11.)

Now, four years afer the loss and long after the time for filing civil actions, and contrary to the agreement not to challenge the arbitrators' award as exceeding their power, Clark claims that the arbitrators' decision that Marc Rich was a proper party exceeded the powers of the arbitrators (all outstanding, experienced New York maritime arbitrators) under the submission made to them and should, therefore, be vacated.

Clark's argument is a highly technical one. It focuses on the word "directly" in the submission agreement and argues that this limited the consideration of the arbitrators to the single question of whether a bill of lading holder is, in its own right, a party to the arbitration agreement between the voyage charterer and the disponent owner. The decision of the arbitrators does not meet that issue directly. Clark argues that the arbitra-

tors concluded that affiliated corporations can disregard their own corporate identities to assert claims under an arbitration agreement to which one of them was not a party, and that Clark had specifically not agreed that the panel should even consider that issue.

Initially, it should be noted that the bases for the conclusion that Marc Rich is a proper party in the arbitration is not set forth, nor is it necessarily limited to the two alternatives suggested by Clark (i.e., that the charter party arbitration provision was incorporated into the bill of lading under the factual circumstances, or that the affiliation between Marc Rich and Alpine provided a sufficient basis for allowing Marc Rich to arbitrate as well). There are other possible bases for the arbitrators' conclusions, e.g., that Clark had implicitly agreed to arbitrate with Marc Rich by participating in the arbitration and responding to the bill of lading holder's demand, or that it was estopped from denying the arbitration demand after the one-year time bar for suits had expired, or that the failure to contest the arbitration demand in a timely fashion had waived any later dispute. It is uncontested that a party who submits a dispute to arbitration can be bound by the results, even though it was not legally required to arbitrate in the first instance. Moreover, a respectable argument can be made that, in circumstances such as prevailed here, the bill of lading implicitly adopts and is consistent with the charter party and its arbitration provision. It is not, however, necessary for this Court to reach those issues.

We start with the acknowledged fact that arbitration awards can only be upset on the basis of the statutory grounds set forth in section 10 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. Subsection (d) of section 10 does include, as its first phrase, the situation where the arbitrators have exceeded their powers. However, that subsection was specifically eliminated as a ground for appeal by virtue of the submission agreement, which provides that "[t]he parties agree that the arbitrators have the power to determine these issues and that they will not appeal nor seek to vacate or modify the Panel's determinations of these issues except, as the case may be, on the following

grounds, namely. . . . " There follows a list of the grounds in section 10, subsections (a)-(d). The first phrase in (d) was purposefully omitted. Clark has, therefore, by its own agreement, precluded itself from making the argument that the arbitrators have exceeded their powers. Moreover, it is clear from the foregoing recitation of facts that Clark never indicated during the arbitration that the submission restricted the panel to a simple consideration of Marc Rich's rights as a bill of lading holder.

It is axiomatic that great deference should be shown to the arbitrators' awards, *Saxis Steamship Cc. v. Multifacs International Traders, Inc.*, 357 F.2d 577, 581-81 (2d Cir. 1967), and that overly technical judicial review of arbitrators' awards frustrate the basic purpose of arbitration so that any doubts as to the submission agreement are resolved in favor of coverage. *Federal Commerce and Navigation Co, v. Kanamatsu-Gosho, Ltd.*, 457 F.2d 387, 389-90 (2d Cir. 1972). To entertain Clark's argument would be to undercut the purpose and desirability of arbitration.

One further, relatively minor matter is raised. The panel included an award of some $3,000 (including interest) for wharfage charges. This subject was not specifically within the submission agreement. However, the submission agreement made an express reservation of rights with respect to other matters within the charter party arbitration agreement. The wharfage charge issue was raised during the hearing and a claim was formally made in the petitioners' arbitration memorandum. Clark, perhaps feeling that it was an inconsequential part of the much larger claim, did not respond to this, apparently choosing to waive any objection to the submission of that issue. (A subsequent arbitration submission could have been made and, apparently, would not have been time barred.) Under these circumstances, we are not disposed to modify the award.

Finally, the petitioners seek costs and attorneys' fees because of Clark's meritless challenge to the award. There certainly would seem to be some merit in awarding attorneys' fees in

these circumstances. As the Second Circuit noted in *Andros Compania Maritima v. Marc Rich & Co. A.G.*, 579 F.2d 691 (2d Cir. 1978): "It seems that as long as even a glint of hope remains for judicial interference with the merits of an arbitration award, we must regretfully anticipate continued efforts to press contentions similar to that rejected here." However, if there are to be deterrents to the increasing tendency to oppose arbitration awards in court, the lead will have to come from our appellate court, which has shown a disinclination to approve innovative trial court imposition of attorneys' fees, absent legislative or contractual bases for such, *Nemeroff v. Abelson*, 620 F. 2d 339 (2d Cir. 1980), unless the litigation was conducted in bad faith. *Nemeroff v. Abelson (II)*, 704 F.2d 652 (2d Cir. 1983). Since this cross-motion occurred at the beginning of the litigation, it is difficult to find bad faith at this point.

Consequently, the motion to confirm the arbitration award is granted. The cross-motion to vacate is denied. Judgment should enter for the petitioners.

SO ORDERED.

Dated: New York, N.Y.
December 9, 1983

/s/ GERARD L. GOETTEL
Gerard L. Goettel
U.S.D.J.

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No. 84-379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLARK OIL & REFINING CORPORATION,

Petitioner,

— against —

UNDERWRITER'S AT LLOYD'S UNDER POLICY NO. KL9576986 and ALPINE SHIPPING COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT LLOYD'S UNDERWRITERS UNDER POLICY NO. KL9576986 IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is there any basis for this Court to review a question of arbitrability where the district court found, as a matter of fact, that the parties had expressly agreed to submit the question to arbitration and where other valid bases exist for sustaining the arbitration award?

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UNDERWRITER'S AT LLOYD'S UNDER POLICY NO. KL9576986 and ALPINE SHIPPING COMPANY

Respondent.

COUNTER-STATEMENT OF THE CASE

The record facts are recited in the opinion of the district judge. (App 6-9)[1] The underlying dispute concerned a cargo claim by Marc Rich & Co. A.G. ("Marc Rich") as bill of lading holder, against petitioner, Clark Oil & Refining Corp. ("Clark"), as carrier and disponent owner of the vessel VOLERE, in respect of a voyage performed in 1979 from Dubai to Bonaire.

Clark never denied the unexplained disappearance of 5,000 barrels – or approximately 210,000 gallons – of Marc Rich's cargo; nor the subsequent increase of Clark's own cargo, also carried on VOLERE. Respondent, Lloyd's Underwriters Under Policy No. Kl9576989 ("Lloyd's"), insured the cargo, paid the insurance and became subrogated to the claim.

[1] References to material included in the Appendices to Clark's petition for certiorari will be identified by "App" followed by the appropriate page reference.

The terms under which Marc Rich's cargo was carried, were embodied in the October 11, 1979 charter party negotiated by Marc Rich's chartering affiliate, Alpine Shipping Company ("Alpine"), with Clark. The charter party contained an arbitration provision of the broadest possible scope.[2] The charter also specifically contemplated issuance of a bill of lading – the agreement between the carrier and the cargo interest – upon terms identical with the charter party and its arbitration provision.

Clark successfully delayed prosecution of arbitration by agreeing to review and respond to Marc Rich's claim. After nearly one year, Marc Rich and Alpine each demanded arbitration with Clark and advised that the demand was also intended to safeguard against the one-year time bar for such claims. Marc Rich's arbitration demand was stated to be made "under the terms of the charter party as incorporated into the Bill of Lading." Clark, through its counsel, agreed to proceed to arbitration and, after seeking and being granted further adjournments, nominated an arbitrator without reserving any rights.

Alpine's right to arbitrate under its charter party with Clark has never been called into question. However, midway through the first hearing and long after expiry of the one-year time bar, Clark, for the first time, questioned the right of Lloyd's/Marc Rich to arbitrate along with Alpine in the proceedings. Clark relied on the self-evident fact that there were no words in the bill of lading expressly incorporating the terms of the charter party or its arbitration provision. This challenge was immediately met with several grounds advanced by Lloyd's in support of "the right of Marc Rich, as bill of lading holder" to arbitrate with Clark. These included Clark's subsequent agreement to arbitrate, waiver and estoppel as well as implied incorporation of charter terms into the bill of lading.[3]

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[2] The charter party called for arbitration in New York of "[a]ny and all differences and disputes of whatsoever nature" arising thereunder.

[3] In addition to these grounds for arbitrating directly against Clark, Marc Rich had separately demanded arbitration, against Alpine, and Alpine, in turn, made a claim against Clark for indemnity in respect of any liability to Marc Rich.

The arbitrators refused to proceed unless the parties agreed to waive their right to try the issue of Marc Rich's standing and to submit it to the panel for final determination.

Clark, after further significant delay, agreed with Lloyd's, in the submission agreement, to submit the issue to the arbitrators. Clark further agreed, that it would not seek to vacate or amend the arbitrators' award on the ground that the arbitrators lacked power to make their determination. The submission agreement provided:

> "The parties agree that the arbitrators have the power to determine these issues and that they will not appeal nor seek to vacate or modify the panel's determinations of these issues except, as the case may be, on the following grounds, namely:"

There follows a list of the grounds in section 10 of the *Federal Arbitration Act*, 9 U.S.C. 10, subsections (a)-(d). Deliberately omitted were the following words in subsection (d): "Where the arbitrators exceeded their powers." The panel – including the most experienced and respected of New York arbitrators – concluded as follows: ". . . that Claimants have presented a thoroughly documented cargo loss claim for which Clark may be found responsible." The award states that "it is the Panel's unanimous decision that Rich is a proper party to this arbitration proceeding and may, along with Alpine, present its claim to this Panel."

1. The District Court Decision

Clark petitioned the District Court to vacate the award on the very ground it had agreed would not be a basis for challenge, namely, that the arbitrators' were not empowered to make their determination that "Rich is a proper party to this arbitration.". Clark contended, as it does now, that the submission agreement presented a very narrow and limited issue to the arbitrators, namely, whether the terms of the charter party and arbitration clause were incorporated into the bill of lading (Clark Brief 6/7); and that the arbitrators exceeded their jurisdiction because they allegedly based their conclusion upon Marc Rich's affiliation with Alpine – an issue which Clark claims it "would

never have consented to submit." (Clark Brief 7) In confirming the award, the district court disagreed and found:

> "Moreover, it is clear from the foregoing recitation of facts that Clark never indicated during the arbitration that the submission restricted the panel to a simple consideration of Marc Rich's rights as a bill of lading holder." (App 10(a))

The court also found a number of additional valid bases for the arbitrators' conclusion, including implicit incorporation of charter terms, subsequent agreement by Clark to arbitrate, corporate affiliation, waiver and estoppel. (App 9A)

Finally, the court concluded that Clark "by its own agreement, precluded itself from making the argument that the arbitrators have exceeded their power." (App 10a)

2. The Court of Appeals Decision

The court of appeals affirmed the district court, and awarded Lloyd's double costs indicating that the appeal had been frivolous. (App 2-3a)

The court of appeals relied upon the following findings of the district court: first, Clark's counsel agreed to submit to the arbitrators the issue "whether Marc Rich was entitled to arbitrate with Clark and whether the claims of Marc Rich or Lloyd's could be asserted by Alpine"; second, one of the issues presented in writing to the arbitrators was "whether Marc Rich, as the alleged bill of lading holder ... is entitled to arbitrate its claims in these proceedings directly with Clark" and third, the parties "specifically agreed that they would not challenge the arbitrators' award on the ground that the panel of arbitrators had exceeded its power in deciding whether Marc Rich was a proper party to the arbitration." (App 2a)

Noting that the basic purpose of arbitration should not be frustrated by "overly technical judicial review of arbitration awards," and that "it has long been the rule to resolve any doubt as to the submission agreement in favor of coverage" (*Federal Commerce & Navigation Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 389-390 (2d Cir. 1972)), the Court of Appeals

concluded that the district court did not err in holding that Clark was precluded from challenging the arbitration award on the ground the arbitrators exceeded their power. (App 3a)

REASONS FOR NOT GRANTING CERTIORARI

POINT I

None of the Traditional Considerations For Granting Certiorari is Present in This Case

The holding of the courts below that Clark was precluded from challenging the arbitration award on the ground that the arbitrators had exceeded their power is entirely consistent with the express written agreement of Clark and, hence, raises no issue of such national importance as to require consideration by this Court on the merits.

Furthermore, Clark is plainly wrong to urge that the decision of the Second Circuit is in conflict with the decision of the District of Columbia Circuit in *Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160 (D.C. Cir. 1981). *Davis* stands for the proposition that where the arbitrators' authority to decide an issue is called into question the reviewing court can determine the issue *de novo*. The district court's decision clearly addressed the issue of arbitrability and held that the parties agreed to submit the issue of Marc Rich's standing to the arbitrators for determination.

The facts before the district court in *Davis* were radically different than those in the instant case. Unlike the broad arbitration clause in this case, the arbitration clause in *Davis* was limited to determining the fair market value of the tendered shares and the demand for arbitration "defined the dispute as involving *only* the valuation of the shares." 667 F.2d at 165 (Emphasis by the court). The district court in this case found that the submission agreement contained no language, whatsoever, which restricted the arbitrators' authority solely to consideration of the question of whether the bill of lading technically incorporated the charter party terms.

The respondent in *Davis* did not, as Clark did here, expressly waive the right to challenge the award on the very ground

which later became the basis for appeal. In fact, from the inception of arbitration, the *Davis* respondent repeatedly objected that no arbitrable dispute existed. Clark, on the other hand, waited over a year and a half after receiving the demand for arbitration before suggesting that it might object to arbitrating with Marc Rich. Thereafter, it never advised the arbitrators of its present restrictive interpretation of the submission agreement. As the district court specifically found, "Clark never indicated during the arbitration that the submission restricted the panel to a simple consideration of Marc Rich's rights as a bill of lading holder."[4] (App 10a)

POINT II

The Confirmation of the Arbitration Award was Plainly Correct

As the district court also found, even taking Clark's artifically narrow reading of the submission agreement, the arbitrators could have concluded that the bill of lading implicitly adopted and was consistent with the charter party and its arbitration clause under the circumstances of this case. (App 9a)[5]

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[4] Clark's own post-hearing Reply Brief in the arbitration argued that the entire standing issue was before the arbitrators: "[Lloyd's] then negotiated with Clark to waive its right to submit the issues of the parties' standing and their right to arbitrate to the appropriate court, in return for their agreement to submit these issues to the panel." Appendix on Appeal at A-440.

[5] Contrary to Clark's argument (Brief 9 fn. 4), express incorporation was not required. And there were numerous facts supporting the conclusion of implied incorporation. Fundamental federal maritime law relating to contracts of carriage and to arbitration recognizes that a charter party or any other contract of affreightment, need not be agreed to in writing, that it may be agreed orally and that an oral fixture for a voyage may validly incorporate an arbitration agreement, so long as the provision incorporated is, itself, in writing. *Interocean Shipping Co. v. National Shipping and Trading Corp.* 523 F.2d 527, 539 (2d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); *Christman v. Maristella Compania Naviera*, 349 F. Supp. 845, 854 (S.D.N.Y. 1971) ("Since the fixture was made orally and was binding ... written document drawn up later was without import, except as a memorandum of the terms ... agreed to orally with respect to the fixture."). "It is not surprising then to find a long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law." *Fisser v. International Bank*, 282 F.2d 231, 233 (2d Cir. 1960).

In addition, the district court found other valid bases for the arbitrators' holding that Marc Rich was entitled to arbitrate with Clark:

> "There are other possible bases [besides the affiliation between Marc Rich and Alpine] for the arbitrators' conclusions, e.g., that Clark had implicitly agreed to arbitrate with Marc Rich by participating in the arbitration and responding to the bill of lading holder's demand, or that it was estopped from denying the arbitration demand after the one-year time bar for suits had expired, or that the failure to contest the arbitration demand in a timely fashion had waived any later dispute. It is uncontested that a party who submits a dispute to arbitration can be bound by the results, even though it was not legally required to arbitrate in the first instance." (App 9a)[6]

It is also clear that Clark's failure to advise the arbitrators of its present restrictive interpretation of the submission agreement constituted a waiver of any objection that the arbitrators exceeded their authority. It is fundamental that:

> "Parties to arbitration proceedings cannot sit idle while an arbitration decision is rendered and then, if the decision is adverse, seek to attack the award collaterally on the grounds not raised before the arbitrator."

United Steelworkers, Etc. v. Smoke-Craft, Inc., 652 F.2d 1356, 1360 (9th Cir. 1981) (failure to object to arbitrating with nonparty to arbitration waived the issue). *See Cook Industries, Inc. v. C. Itoh & Co. (America), Inc.*, 449 F.2d 106, 107-108 (2d Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); *Kodiak Oil Field Haulers, Inc. v. Teamsters Union Local No. 959*, 611 F.2d 1286, 1290 (9th Cir. 1980) (failure to object to arbitrator's bias in arbitration proceeding waived issue).

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[6] It is well settled that an award must be construed in favor of confirmation and to avoid vacatur. *John T. Brady & Co. v. Form-Eze Systems, Inc.* 623 F.2d 261 (2d Cir.), *cert. denied*, 449 U.S. 1062 (1980).

Manifestly, the arbitrators were empowered to render their decision that Marc Rich was entitled to arbitrate with Clark.

CONCLUSION

For the foregoing reasons, respondent Lloyd's respectfully requests that the petition of Clark for a writ of certiorari be denied.

Respectfully submitted,

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